UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

SEP 2 8 2018

REPLY TO THE ATTENTION OF:

Brian Hutchins
Vice President
Red Knight Transportation, L.L.C.
4216 Dewitt Avenue
Mattoon, Illinois 61938

Dear Mr. Hutchins:

Enclosed is a file-stamped Consent Agreement and Final Order (CAFO) which resolves Red Knight Transportation L.L.C. (RK Transportation), docket no. **CAA-05-2018-0031**. As indicated by the filing stamp on its first page, we filed the CAFO with the Regional Hearing Clerk on 9/28/2018.

Pursuant to paragraph 34 of the CAFO, RK Transportation must pay the civil penalty within 30 days of the filing date. Your electronic funds transfer must display the case name and case docket number.

Please direct any questions regarding this case to Andre Daugavietis, Associate Regional Counsel at (312) 886-6663.

Sincerely,

[redacted]

Nathan Frank, Chief
Air Enforcement and Compliance Assurance Section (IL/IN)

Enclosure

cc: Ann Coyle, Regional Judicial Officer/C-14J
Regional Hearing Clerk/E-19J
Andre Daugavietis/C-14J
Julie Armitage, IEPA
Bob Hodanbosi, Ohio EPA

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REGION 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	**Docket No.** CAA-05-2018-0031
	)	
Red Knight Transportation L.L.C.	)	**Proceeding to Assess a Civil Penalty**
Mattoon, Illinois	)	**Under Section 205(c)(1) of the Clean Air Act,**
	)	**42 U.S.C. § 7524(c)(1)**
Respondent.	)	
	)	

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 205(c)(1) of the Clean Air Act (the CAA), 42 U.S.C. § 7524(c)(1), and Sections 22.1(a)(2), 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at 40 C.F.R. Part 22.

2. Complainant is the Director of the Air and Radiation Division, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is Red Knight Transportation Limited Liability Company, a/k/a RK Transportation (Respondent or RKT), a company doing business in Illinois and Ohio.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 203(a)(1) of the CAA prohibits a vehicle manufacturer from selling a new motor vehicle in the United States unless the vehicle is covered by a certificate of conformity. 42 U.S.C. § 7522(a)(1).

10. "Motor vehicle" means any self-propelled vehicle designed for transporting persons or property on a street or highway. Section 216(2) of the CAA, 42 U.S.C. § 7550(2); See also 40 C.F.R. § 85.1703.

11. "Motor vehicle engine" means an engine that is designed to power a motor vehicle.

12. EPA issues certificates of conformity to motor vehicle and motor vehicle engine manufacturers under Section 206(a) of the CAA, 42 U.S.C. § 7525(a), to certify that a particular group of motor vehicles or motor vehicle engines conforms to applicable EPA requirements governing motor vehicle emissions.

13. EPA promulgated emissions standards, under Section 202 of the CAA, 42 U.S.C. § 7521, for particulate matter (PM), nitrogen oxides (NO_x), hydrocarbons (HC), and other pollutants applicable to motor vehicles and motor vehicle engines, including standards for heavy-duty diesel engines (HDDE). See generally 40 C.F.R. Part 86.

14. EPA promulgated regulations for motor vehicles manufactured after 2007 that require HDDE trucks to have onboard diagnostic systems to detect various emission control device parameters and vehicle operations. See Section 202(m) of the CAA and 42 U.S.C. § 7521(m).

15. To meet the emission standards in 40 C.F.R. Part 86 and qualify for a certificate of conformity, HDDE manufacturers may utilize devices and elements of design such as Diesel Particulate Filters (DPFs), Exhaust Gas Recirculation (EGR), and/or Selective Catalytic Reduction Systems (SCRs).

16. Section 203(a)(3) of the CAA makes it unlawful for: "(A) any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under [Title II of the CAA] prior to its sale and delivery to the ultimate purchases, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or (B) for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use."

17. The EPA may administratively assess a civil penalty for violations of section 203(a) of the CAA, 42 U.S.C. § 7522(a). Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1).

18. EPA may assess a civil penalty of up to $3,750 for each applicable CAA violation that occurred between January 12, 2009, and November 2, 2015, and up to $4,527 for each applicable CAA violation that occurred after November 2, 2015 and assessed on or after August

1, 2016 in accordance with Section 205(a) of the CAA, 42 U.S.C. § 7524(a), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

19. Respondent is a limited liability company organized under the laws of the State of Illinois, with its principal office at 1515 Charleston, Ave., P.O. box 963, Mattoon, Illinois, and specifically operating in Mattoon, Illinois and Waverly, Ohio.

20. Respondent is a person, as that term is defined in Section 302(e) of the CAA. 42 U.S.C. § 7602(e).

21. On May 11, 2017, EPA conducted a Clean Air Inspection of Respondent's Waverly, Ohio distribution center.

22. On May 31, 2017, November 6, 2017, and January 23, 2018, EPA sent written Requests for Information to Respondent pursuant to Section 208 of the CAA.

23. In response to the Request for Information, Respondent provided invoices and other information indicating that between 2012 and 2017, Respondent removed the DPFs from 57 HDDE trucks ("Modified Trucks") and removed the EGRs from 16 of those Modified Trucks. To enable the Modified Trucks to operate with the emission controls removed, Respondent installed emission control defeat devices in the form of Engine Control Module ("ECM") tuning products manufactured by Performance Diesel Inc. that have a principal effect of bypassing, defeating, or rendering inoperative HDDE emission control devices or elements of design.

24. The manufacturer of each Modified Truck has obtained a certificate of conformity with HDDE emission standards.

25. Each Modified Truck constitutes a "motor vehicle" as that term is defined by the CAA.

26. Respondent notified EPA that in May and June 2017, the company sold a total of 23 of the 57 Modified Trucks to outside parties and 2 of the 57 Modified Trucks were taken possession of by an insurance company and subsequently sent to a scrap yard.

27. Respondent notified EPA that on or about July 1, 2017, the remaining 32 modified trucks were temporarily idled and parked on an open lot near Mattoon, Illinois. These 32 Modified Trucks are referenced below as "Idled Trucks."

28. EPA alleges that, in violation of Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), Respondent knowingly removed or rendered inoperative devices or elements of design that were installed on or in at least 57 motor vehicles or motor vehicle engines to comply with emission standards promulgated under Title II of the CAA.

29. EPA alleges that, in violation of Section 203(a)(3)(B) of the CAA, Respondent installed at least 57 ECM tuning product that effectively bypassed, defeated, or rendered inoperative emission control devices or elements of design that were installed on or in motor vehicles or motor vehicle engines to comply with the emission standards promulgated under Title II of the CAA, and the Respondent knew or should have known that such products were installed for such use or put to such use.

30. On November 14, 2017, EPA issued a Finding of Violation to Respondent alleging violations of CAA § 203(a)(3)(A).

31. On December 20, 2017 and on subsequent dates, representatives of Respondent met with EPA at the Region 5 Headquarters in Chicago, Illinois to discuss the Finding of Violation, and the Parties have engaged in subsequent communications about resolving the matter.

32. Respondent certifies that it has completed the following compliance and mitigation measures:

a. On or about March 1, 2017, Respondent began purchasing new trucks to replace the Modified Trucks. The new, replacement trucks are understood to have better engine and emission technologies than the Modified Trucks. Respondent estimated the cost of these truck replacements as approximately $3.9 million.

b. As of January 2018, to improve the recordkeeping, oversight, and CAA compliance of the fleet, Respondent hired experienced fleet management employees, including two managers with extensive experience managing truck fleets and two additional maintenance directors with extensive experience maintaining truck fleets. Respondent estimated the cost of these additional staffing positions as approximately $450,000.

c. On February 14-19, 2018, Respondent completed a third-party inspection of the company's existing fleet of HDDE motor vehicles and submitted a final report to EPA. This inspection included both visual inspections and On-Board Diagnostic (OBD) scans of the vehicles and verified that Respondent is no longer operating vehicles without the required emissions control systems, installing defeat devices on any vehicle or removing, disabling, or bypassing emission control system or element of design on any vehicle. Respondent estimated the cost of this third-party inspection as approximately $70,000.

d. On March 2018, Respondent completed and began implementing a company-specific compliance plan and standard operating procedures (SOPs) detailing how Respondent shall maintain continuous and ongoing compliance with Section 203(a) of the Clean Air Act, including how Respondent will train employees and contractors to understand and implement the procedures in the SOP. Respondent

estimated the cost of developing and implementing this plan and SOPs as at least $30,000.

e. As of April 2018, Respondent began leasing and utilizing new vehicle monitoring/tracking/record-keeping software to allow for enhanced electronic record-keeping related to the compliance status of its truck fleet. Respondent estimated the cost of implementing this new software and recordkeeping as approximately $1,500 annually.

Civil Penalty

33. Based on analysis of the factors specified in Section 113(e) of the CAA, 42 U.S.C. § 7413(e), the facts of this case, the compliance steps that Respondent has taken and agrees to take, the Supplemental Environmental Projects that Respondent agrees to implement and Respondents cooperation in resolving this matter, Complainant has determined that an appropriate civil penalty to settle this action is $140,000.

34. Within 30 days after the effective date of this CAFO, Respondent must pay a $140,000 civil penalty by electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read: "D68010727 Environmental Protection Agency"

In the comment or description field of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

35. Respondent must send a notice of payment that states Respondent's name and the docket number of this CAFO to EPA at the following addresses when it pays the penalty:

Attn: Compliance Tracker (AE-18J)
Air Enforcement and Compliance Assurance Branch
Air and Radiation Division
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Andre Daugavietis (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Regional Hearing Clerk (E-19J)
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

36. This civil penalty is not deductible for federal tax purposes.

37. If Respondent does not pay timely the civil penalty or any stipulated penalties due under Paragraph 47, below, EPA may request the Attorney General of the United States to bring an action to collect any unpaid portion of the penalty with interest, nonpayment penalties and the United States enforcement expenses for the collection action under Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

38. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2). Respondent must pay the United States enforcement expenses, including but not limited to attorney's fees and costs incurred by the United States for collection proceedings. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 10 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. 42 U.S.C. § 7413(d)(5).

Supplemental Environmental Projects and Other Conditions

39. For each of the 32 Idled Trucks, Respondent shall either return the Idled Truck's Engine Control Module (ECM) to factory settings and reinstall the Idled Truck's emission controls or scrap the Idled Truck. Scrapped Idled Trucks may not be sold as "trucks" or "engines," but may be stripped and sold for parts, with the exception of the engine block and crankshaft which must be permanently disabled. Within 120 days from the effective date of this CAFO, Respondent shall send a report with verification to EPA that for each of the 32 Idled Trucks, either the Idled Truck's ECM was returned to factory settings and its emission controls were reinstalled or that the Idled Truck was scrapped. For idled trucks that are returned to factory settings, verification shall include either, (a) receipts or invoices of the parts and labor used to return the ECM to factory settings and reinstall the emission controls, or (b) written third party acknowledgement of work completed. For Idled Trucks that are scrapped, verification shall include photos of the hole(s) drilled in the engine block and crankshaft.

40. Respondent shall complete wood-burning appliance replacement supplemental environmental projects (SEP) described below designed to offset the emissions of pollutants, including PM, NO_x, and HC, associated with the violations alleged in the CAFO and to provide long-term environmental/public health benefits to the communities surrounding Respondent's facilities.

a. Wood-Burning Appliance Replacement SEP – Respondent shall provide a rebate and/or pellets as an incentive to persons (Purchasers) who replace or retrofit their inefficient, non-EPA certified, higher-polluting, wood-burning or coal appliances with cleaner-burning, more energy-efficient heating appliances and technologies, such as EPA-certified wood stoves or other cleaner-burning, more energy-efficient appliances (e.g., wood pellet, gas, or propane appliance, or EPA Energy

Star qualified heating appliance). All replacement wood appliances must meet EPA's current New Source Performance Standards (NSPS)[1]. At most one rebate or pellets as an incentive shall be provided per household. Respondent shall ensure that the wood-burning appliances that are replaced under this SEP are permanently removed from use and rendered inoperative and/or appropriately recycled in a manner that is compliant with all local, state, and federal laws and regulations. Respondent agrees to make at least 50 percent of the incentive (rebate and/or pellets) based on documentation that the Purchaser rendered inoperative and/or appropriately recycled the old appliance and to receive written agreement from the Purchaser that the appliance will be rendered inoperative and/or appropriately recycled. Alternatively, Respondent agrees to provide sufficient incentive to the Purchaser to turn in their existing wood appliance when purchasing an EPA-certified wood burning appliance for Respondent to render the turned-in appliance inoperative and/or appropriate recycle it. In implementing the SEP program, Respondent agrees to make available to Purchasers, or prospective Purchasers, information on best burn practices (e.g., EPA's "Wet Wood is a Waste" brochure).

41. In addition, the following criteria apply to the above SEPs:

a. Implementation of the SEPs above shall take no longer than 3 years;

b. Respondent must spend at least $140,000 total on the SEP referenced above with no greater than $20,000 of the total SEP budget going towards marketing, administrative support and outreach costs associated with implementation of the

[1] Includes the Standards of Performance for New Residential Wood Heater (40 C.F.R. Part 60, Subpart AAA) and/or Standards of Performance for New Residential Hydronic Heaters and Forced Air Furnaces (40 C.F.R. Part 60, subpart QQQQ), as amended in March 2015 (*See* 80 FR 13671).

SEP(s). Respondent shall not include its own personnel costs in overseeing the implementation of the SEPs; and

c. If none of the SEPs above are feasible, Respondent may propose to EPA for review and approval another SEP or SEPs not listed above.

42. Respondent certifies as follows:

> I certify that neither Red Knight Transportation nor any affiliate (collectively RKT) is required to perform or develop the SEP(s) listed above by any law, regulation, order, or agreement or as injunctive relief as of the date that I am signing this CAFO. I further certify that RKT has not received, and is not negotiating to receive, credit for the SEP(s) listed above in any other enforcement action.
>
> I certify that RKT is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP(s) listed above. I further certify that, to the best of my knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP(s) listed above, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date that I am signing this CAFO (unless the project was barred from funding as statutorily ineligible). For purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not expired.

43. EPA may inspect Respondent's facilities or vehicles at any time to monitor Respondent's compliance with this CAFO's requirements.

44. Within 60 calendar days of completion of the SEP(s) above, Respondent must submit a SEP completion report to EPA. This report must contain the following information:

a. Detailed description of the SEP(s) as completed;

b. Description of any problems encountered and the actions taken to correct the problems;

c. An itemized list of available information regarding the types and numbers of appliances that were recycled/ rendered inoperable and replaced, and the value of the rebate for each;

d. Certification that Respondent has completed the SEP(s) in compliance with this CAFO; and

e. Description of the environmental and public health benefits resulting from the SEP(s) (quantify the benefits and pollution reductions to the extent feasible).

45. Respondent must submit all notices and reports required by this CAFO by first-class mail to the Compliance Tracker of the Air Enforcement and Compliance Assurance Branch at the address provided in Paragraph 35, above.

46. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

> I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

47. If Respondent violates any requirement of this CAFO relating to the SEPs, Respondent must pay stipulated penalties to the United States as follows:

a. Except as provided in subparagraph b, below, if Respondent did not complete the SEP(s) satisfactorily according to the requirements of this CAFO, Respondent must pay a stipulated penalty of up to $140,000.

b. If Respondent did not fully complete the SEP(s)according to the requirements of this CAFO, but EPA determines that Respondent made good faith and timely efforts to complete the SEP(s) and certified, with supporting documents, that it

spent at least 90 percent of the amounts set forth above, Respondent will not be liable for any stipulated penalty under subparagraph a, above.

c. If Respondent completed the SEP(s) satisfactorily, but spent less than 90 percent of the amount set forth in Paragraph 41, Respondent must propose for EPA approval and undertake an additional Project with similar environmental benefits to that of the uncompleted Project(s) or pay a stipulated penalty of the difference between $140,000 and the amount spent.

d. If Respondent did not submit timely the completion report for the SEP(s) or any other report required by this CAFO, Respondent must pay penalties in the amount of $100 for each day after the report was due until it submits the report.

48. EPA's determinations of whether Respondent completed the SEP(s) satisfactorily and whether Respondent made good faith and timely efforts to complete the SEP(s) will bind Respondent.

49. Respondent must pay any stipulated penalties within 30 days of receiving EPA's written demand for the penalties. Respondent will use the method of payment specified in Paragraph 34, above, and will pay interest and nonpayment penalties on any overdue amounts.

50. Any public statement that Respondent makes referring to the SEP(s) must include the following language: "RKT undertook this project under the settlement of the United States Environmental Protection Agency's enforcement action against Red Knight Transportation for violations of Section 203 of the Clean Air Act."

51. If an event occurs which causes or may cause a delay in completing the SEP as required by this CAFO:

a. Respondent must notify EPA in writing within 10 days after learning of an event which caused or may cause a delay in completing the SEP. The notice must

describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify EPA according to this paragraph, Respondent will not receive an extension of time to complete the SEP.

b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.

c. If EPA does not agree that circumstances beyond the control of Respondent caused or may a delay in completing the SEP, EPA will notify Respondent in writing of its decision and any delays in completing the SEP will not be excused.

d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased costs for completing the SEP will not be a basis for an extension of time under subparagraph b, above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

52. For federal income tax purposes, Respondent will neither capitalize into inventory or basis, nor deduct any costs or expenditures incurred in performing the SEP.

53. By signing this Consent Agreement, Respondent certifies that from the date of their signature, it will not manufacture, sell, offer for sale, or install any aftermarket defeat devices, including ECM tuning products, where a principal effect of the device is to bypass, defeat, or render inoperative any emission-related device or element of design installed on or in a motor vehicle or motor vehicle engine, and will not remove or render inoperative any emissions-related device or element of design installed on or in a motor vehicle or motor vehicle engine.

Toward this end, the Respondent agrees to comply with the Compliance Plan attached as Appendix A of this CAFO.

General Provisions

54. Consistent with the Standing Order Authorizing E-Mail Service of Orders and Other Documents Issued by the Regional Administrator or Regional Judicial Officer under the Consolidated Rules, dated March 27, 2015, the parties consent to service of this CAFO by e-mail at the following e-mail addresses: daugavietis.andre@epa.gov (for Complainant), and legal@ruralking.com (for Respondent). The parties waive their right to service by the methods specified in 40 C.F.R. § 22.6.

55. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in this CAFO.

56. The effect of the settlement described in Paragraph 55 above, is conditioned upon the accuracy of Respondent's representations to EPA, as set forth in Paragraphs 26 and 27.

57. The CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

58. This CAFO does not affect Respondent's responsibility to comply with the CAA and other applicable federal, state and local laws. Except as provided in Paragraph 55, above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by EPA.

59. Respondent certifies that it is currently in compliance and will continue to comply with CAA § 203(a)(3)(A) and CAA § 203(a)(3)(B).

60. This CAFO shall become effective after execution of the Final Order by the Regional Judicial Officer and filing with the Regional Hearing Clerk.

61. This CAFO constitutes an "enforcement response" as that term is used in EPA's Clean Air Act Mobile Source Civil Penalty Policy to determine Respondent's "full compliance history" under Section 205(b) of the CAA, 42 U.S.C. § 7524(b).

62. The terms of this CAFO bind Respondent, its successors and assigns.

63. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

64. Each party agrees to bear its own costs and attorney's fees in this action.

65. This CAFO constitutes the entire agreement between the parties.

Red Knight Transportation L.L.C., Respondent

9/27/18

Date

[redacted]

Brian Hutchins
Vice President
Red Knight Transportation L.L.C.

United States Environmental Protection Agency, Complainant

9/28/18
Date

[redacted]
Edward Nam
Director
Air and Radiation Division
U.S. Environmental Protection Agency, Region 5

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

9/28/18
Date

[redacted]
Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

Appendix A:

Compliance Plan to Avoid Illegal Tampering and Aftermarket Defeat Devices

This document explains how to help ensure compliance with the Clean Air Act's prohibitions on tampering and aftermarket defeat devices. The document specifies what the law prohibits, and sets forth two principles to follow in order to prevent violations.

The Clean Air Act Prohibitions on Tampering and Aftermarket Defeat Devices

The Act's prohibitions against tampering and aftermarket defeat devices are set forth in section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3), (hereafter "§ 203(a)(3)"). The prohibitions apply to all vehicles, engines, and equipment subject to the certification requirements under sections 206 and 213 of the Act. This includes all motor vehicles (e.g., light-duty vehicles, highway motorcycles, heavy-duty trucks), motor vehicle engines (e.g., heavy-duty truck engines), nonroad vehicles (e.g., all-terrain vehicles, off road motorcycles), and nonroad engines (e.g., marine engines, engines used in generators, lawn and garden equipment, agricultural equipment, construction equipment). Certification requirements include those for exhaust or "tailpipe" emissions (e.g., oxides of nitrogen, carbon monoxide, hydrocarbons, particulate matter, greenhouse gases), evaporative emissions (e.g., emissions from the fuel system), and onboard diagnostic systems.

The prohibitions are as follows:

> "The following acts and the causing thereof are prohibited–"
>
> > **Tampering:** CAA § 203(a)(3)(A), 42 U.S.C. § 7522(a)(3)(A), 40 C.F.R. § 1068.101(b)(1): "for any person to remove or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser;"
> >
> > **Defeat Devices:** CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), 40 C.F.R. § 1068.101(b)(2): "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any [vehicle, engine, or piece of equipment], where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use."

Section 203(a)(3)(A) prohibits tampering with emission controls. This includes those controls that are in the engine (e.g., fuel injection, exhaust gas recirculation), and those that are in the exhaust (e.g., filters, catalytic convertors, and oxygen sensors). Section 203(a)(3)(B) prohibits (among other things) aftermarket defeat devices, including hardware (e.g., certain modified exhaust pipes) and software (e.g., certain engine tuners and other software changes).

EPA's longstanding view is that conduct that may be prohibited by § 203(a)(3) does not warrant enforcement if the person performing that conduct has a documented, reasonable basis for knowing that the conduct does not adversely affect emissions. *See* Mobile Source Enforcement Memorandum 1A (June 25, 1974).

EPA evaluates each case independently, and the absence of such reasonable basis does not in and of itself constitute a violation. When determining whether tampering occurred, EPA typically compares the vehicle after the service to the vehicle's original, or "stock" configuration (rather than to the vehicle prior to the service). Where a person is asked to perform service on an element of an emission control system that has already been tampered, EPA typically does not consider the service to be illegal tampering if the person either declines to perform the service on the tampered system or restores the element to its certified configuration.

Below are two guiding principles to help ensure Respondent commits no violations of the Act's prohibitions on tampering and aftermarket defeat devices.

Principle 1: Respondent Will Not Modify any OBD System

Respondent will neither remove nor render inoperative any element of design of an OBD system.[i] Also, Respondent will not manufacture, sell, offer for sale, or install any part or component that bypasses, defeats, or renders inoperative any element of design of an OBD system.

Principle 2: Respondent Will Ensure There is a *Reasonable Basis* for Conduct Subject to the Prohibitions

For conduct unrelated to OBD systems, Respondent will have a *reasonable basis* demonstrating that its conduct[ii] does not adversely affect emissions. Where the conduct in question is the manufacturing or sale of a part or component, Respondent must have a *reasonable basis* that the installation and use of that part or component does not adversely affect emissions. Respondent will fully document its *reasonable basis*, as specified in the following section, at or before the time the conduct occurs.

Reasonable Bases

This section specifies several ways that Respondent may document that it has a "reasonable basis" as the term is used in the prior section. In any given case, Respondent must consider all the facts including any unique circumstances and ensure that its conduct does not have any adverse effect on emissions.[iii]

A. **Identical to Certified Configuration:** Respondent generally has a reasonable basis if its conduct: is solely for the maintenance, repair, rebuild, or replacement of an emissions-related element of design; and restores that element of design to be identical to the certified configuration (or, if not certified, the original configuration) of the vehicle, engine, or piece of equipment.[iv]

B. **Replacement After-Treatment Systems:** Respondent generally has a reasonable basis if the conduct:

(1) involves a new after-treatment system used to replace the same kind of system on a vehicle, engine or piece of equipment and that system is beyond its emissions warranty; and

(2) the manufacturer of that system represents in writing that it is appropriate to install the system on the specific vehicle, engine or piece of equipment at issue.

C. **Emissions Testing:**[v] Respondent generally has a reasonable basis if the conduct:

(1) alters a vehicle, engine, or piece of equipment;

(2) emissions testing shows that the altered vehicle, engine, or piece of equipment will meet all applicable emissions standards for its full useful life; and

(3) where the conduct includes the manufacture, sale, or offering for sale of a part or component, that part or component is marketed only for those vehicles, engines, or pieces of equipment that are appropriately represented by the emissions testing.

D. **EPA Certification:** Respondent generally has a reasonable basis if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by EPA under 40 C.F.R. Part 85 Subpart V (or any other applicable EPA certification program).[vi]

E. **CARB Certification:** Respondent generally has a reasonable basis if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by the California Air Resources Board ("CARB").[vii]

Endnotes

[i] *OBD system* includes any system which monitors emission-related elements of design, or that assists repair technicians in diagnosing and fixing problems with emission-related elements of design. If a problem is detected, an OBD system should record a diagnostic trouble code, illuminate a malfunction indicator light or other warning lamp on the vehicle instrument panel, and provide information to the engine control unit such as information that induces engine derate (as provided by the OEM) due to malfunctioning or missing emission-related systems. Regardless of whether an element of design is commonly considered part of an OBD system, the term "OBD system" as used in this Appendix includes any element of design that monitors, measures, receives, reads, stores, reports, processes or transmits any information about the condition of or the performance of an emission control system or any component thereof.

[ii] Here, the term *conduct* means: all service performed on, and any change whatsoever to, any emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3); the manufacturing, sale, offering for sale, and installation of any part or component that may alter in any way an emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3), and any other act that may be prohibited by § 203(a)(3).

[iii] General notes concerning the Reasonable Bases: Documentation of the above-described reasonable bases must be provided to EPA upon request, based on EPA's authority to require information to determine compliance. CAA § 208, 42 U.S.C. § 7542. EPA issues no case-by-case pre-approvals of reasonable bases, nor exemptions to the Act's prohibitions on tampering and aftermarket defeat devices (except where such an exemption is available by regulation). A reasonable basis consistent with this Appendix does not constitute a certification, accreditation, approval, or any other type of endorsement by EPA (except in cases where an EPA Certification itself constitutes the reasonable basis). No claims of any kind, such as "Approved [or certified] by the Environmental Protection Agency," may be made on the basis of the reasonable bases described in this Policy. This includes written and oral advertisements and other communication. However, if true on the basis of this Appendix, statements such as the following may be made: "Meets the emissions control criteria in the United States Environmental Protection Agency's Tampering Policy in order to avoid liability for violations of the Clean Air Act." There is no reasonable basis where documentation is fraudulent or materially incorrect, or where emissions testing was performed incorrectly.

[iv] Notes on Reasonable Basis A: The conduct should be performed according to instructions from the original manufacturer (OEM) of the vehicle, engine, or equipment. The "certified configuration" of a vehicle, engine, or piece of equipment is the design for which EPA has issued a certificate of conformity (regardless of whether that design is publicly available). Generally, the OEM submits an application for certification that details the designs of each product it proposes to manufacture prior to production. EPA then "certifies" each acceptable design for use, in the upcoming model year. The "original configuration" means the design of the emissions-related elements of design to which the OEM manufactured the product. The appropriate source for technical information regarding the certified or original configuration of a product is the product's OEM. In the case of a replacement part, the part manufacturer should represent in writing that the replacement part will perform identically with respect to emissions control as the replaced part, and should be able to support the representation with either: (a) documentation that the replacement part is identical to the replaced part (including engineering drawings or similar showing identical dimensions, materials, and design), or (b) test results from emissions testing of the replacement part. In the case of engine switching, installation of an engine into a different vehicle or piece of equipment by any person would be considered tampering unless the resulting vehicle or piece of equipment is (a) in the same product category (e.g., light-duty vehicle) as the engine originally powered and (b) identical (with regard to all emissions-related elements of design) to a certified configuration of the same or newer model year as the vehicle chassis or equipment. Alternatively, Respondent may show through emissions testing that there is a reasonable basis for an engine switch under Reasonable Basis C. Note that there are some substantial practical limitations to switching engines. Vehicle chassis and engine designs of one vehicle manufacturer are very distinct from those of another, such that it is generally not possible to put an engine into a chassis of a different manufacturer and have it match up to a certified configuration.

[v] Notes on emissions testing: Where the above-described reasonable bases involve emissions testing, unless otherwise noted, that testing must be consistent with the following. The emissions testing may be performed by someone other than the person performing the conduct (such as an aftermarket parts manufacturer), but to be consistent with this Appendix, the person performing the conduct must have all documentation of the reasonable basis at or before the conduct. The emissions testing and documentation required for this reasonable basis is the same as the testing and documentation required by regulation (e.g., 40 C.F.R. Part 1065) for the purposes of original EPA certification of the vehicle, engine, or equipment at issue. Accelerated aging techniques and in-use testing are acceptable only insofar as they are acceptable for purposes of original EPA certification. The applicable emissions standards are either the emissions standards on the Emission Control Information Label on the product (such as any stated family emission limit, or FEL), or if there is no such label, the fleet standards for the product category and model year. To select test vehicles or test engines where EPA regulations do not otherwise prescribe how to do so for purposes of original EPA certification of the vehicle, engine, or equipment at issue, one must choose the "worst case" product from among all the products for which the part or component is intended. EPA generally considers "worst case" to be that product with the largest engine displacement within the highest test weight class. The vehicle, engine, or equipment, as altered by the conduct, must perform identically both on and off the test(s), and can have no element of design that is not substantially included in the test(s).

[vi] Notes on Reasonable Basis D: This reasonable basis is subject to the same terms and limitations as EPA issues with any such certification. In the case of an aftermarket part or component, there can be a reasonable basis only if: the part or component is manufactured, sold, offered for sale, or installed on the vehicle, engine, or equipment for which it is certified; according to manufacturer instructions; and is not altered or customized, and remains identical to the certified part or component.

[vii] Notes on Reasonable Basis E: This reasonable basis is subject to the same terms and limitations as CARB imposes with any such certification. The conduct must be legal in California under California law. However, in the case of an aftermarket part or component, EPA will consider certification from CARB to be relevant even where the certification for that part or component is no longer in effect due solely to passage of time.

Consent Agreement and Final Order
In the matter of: Red Knight Transportation
Docket Number:
CAA-05-2018-0031

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, docket number CAA 05 2018 0031, which was filed on 9/28/2018, in the following manner to the following addressees:

Copy by Certified Mail to Respondent:

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Dated: September 28, 2018 [redacted]

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5